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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 157

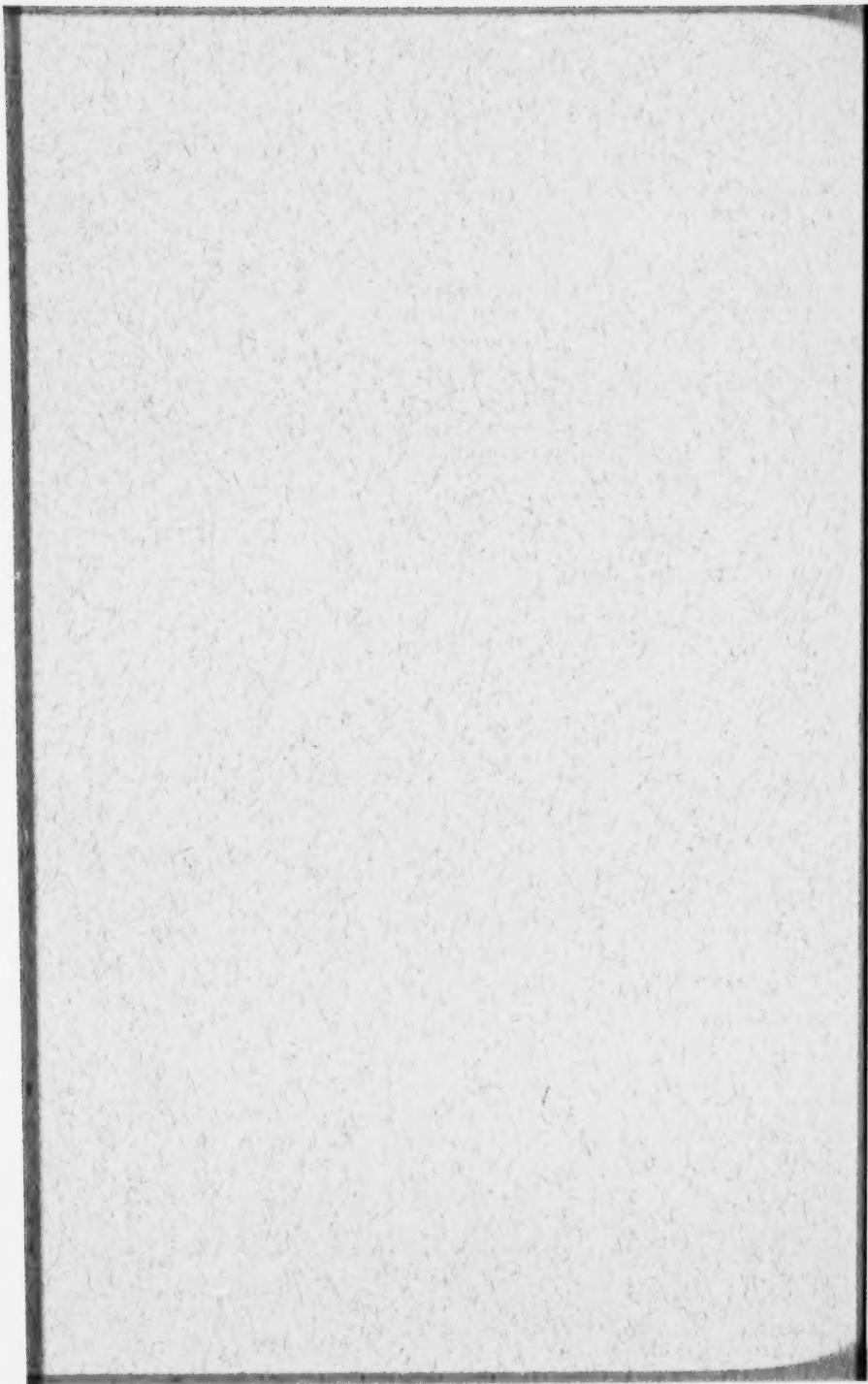
UNITED STATES OF AMERICA, EX REL. ARTHUR JOHNSTON,
Petitioner,

v.

PETER B. CAREY, Sheriff of Cook County, Illinois,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT, AND BRIEF IN
SUPPORT THEREOF.**

BRIEN McMAHON,
Counsel for Petitioner.



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PETER B. CAREY, Sheriff of Cook County, Illinois,
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**PETITION FOR A WRIT OF CERTIORARI TO THE
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—
The petitioner, Arthur Johnston, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on May 8, 1944 (R. 41), denying the Petition for Rehearing of the judgment of that Court on April 17, 1944 (R. 28-30), affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, on October 4, 1943 (R. 16, 17), sustaining the demurrer to petition for writ of habeas corpus, quashing the writ, and remanding relator to the custody of the Sheriff of Cook County.

OPINIONS BELOW.

The judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division (R. 16, 17), is not reported. The opinion of the Circuit Court of Appeals (R. 28-30) is not yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals denying the Petition for Rehearing was entered on May 8, 1944. The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by the Court on May 7, 1934.

QUESTIONS PRESENTED.

1. Whether the Court erred in holding that petitioner has failed to exhaust his remedies in the State Courts.
2. Whether the Court erred in affirming the judgment of the District Court sustaining the demurrer to the petition for writ of habeas corpus.
3. Whether petitioner was denied his Constitutional right to be not deprived of liberty without due process of law by failure of the District Court to hear testimony on facts alleged in petition for writ of habeas corpus.

STATUTES INVOLVED.

R. S. Sec. 751; United States Code, Title 28, Sec. 451.

R. S. Sec. 752; Act of February 13, 1925, 43 Stat. 940; United States Code, Title 28, Sec. 452.

R. S. Sec. 754; United States Code, Title 28, Sec. 454.

R. S. Sec. 755; United States Code, Title 28, Sec. 455.

R. S. Sec. 756; United States Code, Title 28, Sec. 456.

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R. S. Sec. 759; United States Code, Title 28, Sec. 459.

R. S. Sec. 760; United States Code, Title 28, Sec. 460.

R. S. Sec. 761; United States Code, Title 28, Sec. 461.

Constitution of the United States, Amendments V and XIV.

See Appendix. —

STATEMENT.

Petitioner was indicted in the Criminal Court of Cook County, Illinois, on October 31, 1941, in an indictment charging petitioner, with one Goldberg, Guralnik, and Poznansky, in three counts: (1) with robbery with a gun, (2) simple robbery, and (3) buying and receiving certain stolen furs which formed the subject of the first two counts (R. 2, 3, 14). On March 23, 1942, a separate trial was granted defendants Goldberg, Guralnik, and Poznansky and counts 1 and 2 against petitioner were dismissed (R. 3, 14). Brought to trial before a petit jury he was found guilty on March 25, 1942 (R. 3, 14). None of the stolen property was found in petitioner's possession or produced at the trial and he was convicted solely on the testimony of the said accomplices Goldberg, Guralnik, and Poznansky (R. 3, 14), who testified that certain furs had been seized by them in an armed robbery on October 16, 1941, and on the same day sold and delivered to petitioner (R. 3). On April 9, 1942, Goldberg, Guralnik, and Poznansky were placed on probation by the judge of the trial court (R. 3), which court on April 7, 1942, had sentenced petitioner to a term of one to ten years in the State Penitentiary (R. 3). On appeal direct to the Supreme Court of the State of Illinois the decision of the Criminal Court was affirmed (R. 3, 4), and the Supreme Court denied a petition for rehearing (R. 4). Shortly after May 15, 1943, petitioner was taken into custody by the Sheriff of Cook County pending removal to the State Penitentiary (R. 4). In the meantime and while the appeal was being considered in the Supreme Court of the State of Illinois, and after the term of court which had convicted petitioner had expired, four police officers of the City of Chi-

eago searched the home of Poznansky, one of petitioner's codefendants, and found secreted therein a large portion of the stolen property which Poznansky, Goldberg, and Guralnik had testified under oath had been stolen and sold to petitioner on October 16, 1941 (R. 4). Petitioner thereupon on June 15, 1942, filed a petition in the Criminal Court of Cook County under Section 72 of the State Practice Act, providing for the correction of errors of fact in judicial records, a form of procedure replacing the former writ of error *coram nobis* (R. 4). Petitioner requested a trial by jury on the issues of fact, which was refused by the Criminal Court and the case decided against petitioner (R. 4, 11-13). An appeal was taken to the Supreme Court of the State of Illinois which on March 16, 1943, affirmed the judgment of the Criminal Court (R. 4, 5). Petition for rehearing was filed and denied on May 14, 1943 (R. 5). Having apparently exhausted his remedies in the State Courts, petitioner filed petition for writ of habeas corpus on June 3, 1943, in the District Court of the United States for the Northern District of Illinois, alleging that he had been convicted solely on perjured testimony, thus being deprived of his liberty without due process of his rights under the Fourteenth Amendment to the Constitution of the United States (R. 5). Demurrer to the petition was sustained (R. 14-16), and on appeal to the Circuit Court of Appeals for the Seventh Circuit the judgment of the District Court was affirmed (R. 28-30). Petition for rehearing was filed and denied on May 8, 1944. Urged by petitioner on appeal from the District Court is (1) that the court erred in sustaining the demurrer to the petition for writ of habeas corpus, (2) that the court erred in failing to hold a hearing to determine whether petitioner had been convicted on perjured testimony, (3) that the court erred in refusing to hear evidence which would indicate exceptional circumstances and the existence of peculiar urgency for intervention of a Federal Court, and (4) that petitioner is deprived of his liberty without due process of law in violation of the Constitution of the United States.



REASONS FOR GRANTING THE WRIT.

One of the grounds alleged in the demurrer to the petition for writ of habeas corpus, and approved by the Federal District Court, is that petitioner had not exhausted his remedies in the State Courts. An examination of the record would appear to prove the fallacy of that contention. Petitioner through able and energetic counsel vainly adopted every possible legal method to have the case reviewed on its merits in the State Courts. Instead of permitting petitioner to present evidence in support of the averment in his petition for writ of habeas corpus that the discovery of a large portion of the stolen goods in the home of the accomplice, Poznansky, served to indicate that his conviction was the result of perjured testimony, the District Court deprived petitioner of his rights by sustaining the demurrer to the petition.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

It is important to note that in the trial of the case in the Criminal Court of Cook County, Illinois, which resulted in the conviction of petitioner on the testimony of the three accomplices who stated that at the point of a gun they robbed a certain person of a quantity of furs, and on the same day sold and delivered them to petitioner who it was charged knew the goods had been stolen, it does not appear that any of the stolen property was found in petitioner's possession nor produced at the trial. Thereafter, and while the judgment of conviction was pending on appeal to the Supreme Court of the State of Illinois, police officers of the City of Chicago searched the home of one of the accomplices who had testified at the trial as to the robbery of the furs and their sale to petitioner and there discovered a large portion of the stolen property. Relief for petitioner was sought in the state courts by means of a proceeding in the nature of a writ of error *coram nobis*, on which a jury

trial was requested on the issues of fact. This perfectly reasonable request was denied, though it would appear that petitioner was entitled to the same measure of justice on the issue of fact as was accorded as a matter of right at his trial. The case was decided against petitioner and affirmed on appeal to the Supreme Court of the State of Illinois, which court also denied petition for rehearing. Thus, petitioner was forced to the relief afforded by the habeas corpus acts in the Federal Courts, having exhausted his remedies in the State Courts. (*Amrine v. Tines*, 131 F. (2d) 827, 832, C. C. A. 10th; *Cary v. Brady*, 125 F. (2d) 253, 254, C. C. A. 4th; *Sharpe v. Buchanan, Warden*, 317 U. S. 238). In *Ex Parte Hawk*, 321 U. S. 114, 64 Sup. Ct. 448, this court remarked that until petitioner in that case sought without avail his remedy by the common law writ of error coram nobis it could not be said that his State remedies had been exhausted. In that case this Court pointed out that the often quoted statement in *United States ex rel. Kennedy v. Tyler*, 269 U. S. 17, that the writ of habeas corpus in the Federal Courts is available only "in rare cases" presenting "exceptional circumstances of peculiar urgency" was made in a case where petitioner had not exhausted his State remedies and is inapplicable to one in which petitioner has exhausted his State remedies and in which he makes a substantial showing of a denial of a Federal right. Again, it is pointed out that if State process affords no remedy, as in *Mooney v. Holohan*, 294 U. S. 115, or because the remedy afforded by State process proves in practice unavailable or seriously inadequate, *Moore v. Dempsey*, 261 U. S. 86, petitioner is without remedy unless a Federal Court entertains his petition for habeas corpus, *Ex parte Hawk, supra*, 64 Sup. Ct. 448, 321 U. S. 114. If the furs discovered and seized by the Chicago police in the home of the accomplice Poznansky were in truth and fact, as alleged, a large part of the furs stolen by the three accomplices and testified to as having been sold and delivered to petitioner then it follows that petitioner was convicted on perjured testimony.

unless a satisfactory explanation is made as to how the furs came into Poznansky's possession. No better way exists to establish the facts than by a full hearing under the habeas corpus acts. R. S. Sec. 760 provides for the procedure in such cases before the courts "so that thereby the material facts may be ascertained" and R. S. Sec. 761 emphasizes that the court shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require. The manner in which the district court disposed of this case appears to have deprived petitioner of his right to due process of law by failing to proceed to determine the facts by hearing the testimony and arguments as required by R. S. Sec. 761.

CONCLUSION.

For the reasons stated it is respectfully submitted that this petition for writ of certiorari should be granted.

BRIEN McMAHON,
Counsel for Petitioner.

APPENDIX

APPENDIX.**Statutes Involved.**

R. S. Sec. 751. United States Code, Title 28, Sec. 451.

Power of courts. The Supreme Court and the District courts shall have power to issue writs of habeas corpus.

R. S. Sec. 752. Act of Feb. 13, 1925, 43 Stat. 940. United States Code, Title 28, Sec. 452.

Power of judges. The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

R. S. Sec. 754. United States Code, Title 28, Sec. 454.

Application for; complaint in writing. Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

R. S. Sec. 755. United States Code, Title 28, Sec. 455.

Allowance and direction. The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

R. S. Sec. 756. United States Code, Title 28, Sec. 456.

Time of return. Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance

of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days.

R. S. Sec. 757. United States Code, Title 28, Sec. 457.

Form of return. The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party.

R. S. Sec. 758. United States Code, Title 28, Sec. 458.

Body to be produced. The person making the return shall at the same time bring the body of the party before the judge who granted the writ.

R. S. Sec. 759. United States Code, Title 28, Sec. 459.

Day for hearing. When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time.

R. S. Sec. 760. United States Code, Title 28, Sec. 460.

Denial of return; counter allegations; amendments. The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

R. S. Sec. 761. United States Code, Title 28, Sec. 461.

Summary hearing; disposition of party. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

Constitution of the United States, Amendment V.

No person shall be *** deprived of life, liberty, or property, without due process of law; ***.

Constitution of the United States, Amendment XIV.

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

